United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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United States Court of Appeals for the District of Columbia

JANUARY TERM, 1939.

No. 7371 **442**

BUTLER BROTHERS, PETITIONER,

vs.

DISTRICT OF COLUMBIA.

PETITION FOR REVIEW FROM THE BOARD OF TAX APPEALS FOR THE DISTRICT OF COLUMBIA.

FILED MARCH 23, 1939

PRINTED MAY 17, 1939

United States Court of Appeals for the District of Columbia

JANUARY TERM, 1939.

No. 7371

BUTLER BROTHERS, PETITIONER,

vs.

DISTRICT OF COLUMBIA.

PETITION FOR REVIEW FROM THE BOARD OF TAX APPEALS FOR THE DISTRICT OF COLUMBIA

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9—1659

Board of Tax Appeals for the District of Columbia

Docket No. 62

BUTLER BROTHERS, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

Certificate

I, Phyllis A. Ragusa, Clerk of the Board of Tax Appeals for the District of Columbia do hereby certify that the foregoing pages 1 to 24, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Designation of Record in the Petition for Review in the appeal as above numbered and entitled.

In Testimony Whereof, I hereunto set my hand and affix the seal of the Board of Tax Appeals for the District of Columbia this 23rd day of March, 1939.

PHYLLIS A. RAGUSA
(Seal) *Clerk, Board of Tax Appeals*
for the District of Columbia

1 Board of Tax Appeals for the District of Columbia

Docket No. 62

BUTLER BROTHERS, *Petitioner*,

vs.

DISTRICT OF COLUMBIA, *Respondent*.

Counsel: Bradley T. J. Mettee, Jr. Esq. Address 2500 Baltimore Trust Building, Baltimore, Md.

Docket

Date	Proceeding	Memorandum
1938		Business Privilege Tax
Aug. 17	Petition filed.	
" 18	Taxpayer notified. Served A. A.	
Sept. 7	Issue joined, hearing set for 9/28/38	

" 19	Motion for postponement of hearing to 10/15/38 Granted.
Oct. 13	Entry of appearance of counsel for petitioner.
" 15	Hearing
" 15	Brief filed by petitioner
" 17	Answer filed by respondent.
Nov. 3	Findings of Fact and Opinion
" 8	Motion to amend Findings of Fact by Respondent.
" 8	Memorandum (Amended Findings of Fact)
Dec. 28	Computation of Tax
1939	
Jan. 3	Decision
Feb. 1	Petition for Review and Notice of filing petition.
" 18	Supplemental Designation of Record.
Mar. 3	Statement of Evidence
" 11	Stipulation
" 13	Supplemental Designation of Record

2 Endorsed: Received and Filed Aug 17 1938
Board of Tax Appeals for the District of Columbia

Board of Tax Appeals for the District of Columbia

Docket No. 62

BUTLER BROTHERS, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

Petition

The above named Petitioner petitions for a cancellation of an assessment of taxes against it and for a refund of the taxes paid, and alleges as follows:

1. The petitioner is Butler Brothers, a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business in Chicago, Illinois, and with a branch office or place of business at No. 200 West Baltimore Street, Baltimore, Maryland.

2. The tax in controversy is imposed by Title VI of the District of Columbia Revenue Act of 1937 and is a tax on the privilege of doing business or on the gross receipts derived therefrom for the fiscal year ending June 30, 1938,

and in the amount of two thousand and eight dollars and seventy-four cents ($2,008.74).

3. The notice of assessment was dated June 6, 1938, as will appear in the copy of notice of assessment hereto attached and marked "Exhibit A". The return upon which said assessment was made was filed under protest on May 31, 1938, copy of said return and protest being attached hereto and marked "Exhibit B". The tax assessed was paid under protest on June 10, 1938, copy of a letter enclosing check being attached hereto and marked "Exhibit C".

3 4. The assessment of the tax set forth on the notice of assessment is based upon the following errors:

(a) Butler Brothers does no business and exercises no trade, profession, vocation or commercial activity in the District of Columbia, and receives no payments or considerations in or by reason of a sale made in or service rendered in, or transaction had in the District of Columbia. The method of doing business employed by Butler Brothers constitutes "interstate commerce" and the tax therefore does not apply to the same and the gross receipts derived therefrom are not subject to taxation by the District of Columbia. If, however, it is held that the tax does apply to the method of doing business employed by Butler Brothers and the gross receipts derived therefrom, the tax is unconstitutional. (*District Grocery Stores, Inc.* vs. *District of Columbia*, decided July 22, 1938; *Alpha Portland Cement Co.* vs. *Massachusetts*, 268 U. S. 203).

5. The facts upon which the Petitioner relies as the basis of this proceeding are as follows:

(a) Butler Brothers is engaged in the wholesaling of dry goods and general merchandise and conducts its business from its office or place of business in Baltimore, Maryland, as follows:

Salesmen are sent from the said office into the territory covered by said branch, including the States of Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, West Virginia, and parts of Pennsylvania, Tennessee and Kentucky, as well as into the District of Columbia, and such salesmen solicit orders for merchandise, which orders are sent to the office at Baltimore for investigation of credit

and for acceptance or rejection. If such orders are accepted at the office in Baltimore, the merchandise is shipped, pursuant to the contract so made at Baltimore, from the store or warehouse in Baltimore, or in some instances direct from a factory or warehouse, no such factory or warehouse being located in the District of Columbia, by trucks of Butler Brothers, by independent trucking agencies, by
parcel post, or by rail to the purchasers. When ship-
4 ments are made by trucks of Butler Brothers, such
trucks come into the District of Columbia, make their
deliveries and immediately leave. In addition to orders received through the salesmen, orders are frequently received at Baltimore by telephone, telegraph, or by mail. Such orders as are accepted are accepted and filled in the same manner as set forth above. In addition to the foregoing, customers frequently come to the place of business in Baltimore of Butler Brothers and place orders in person. Delivery of such orders is made, in addition to the manner set forth above, in some instances directly to the purchasers, who, themselves, transport the goods to their places of business in the District of Columbia and elsewhere.

(b) That your Petitioner, Butler Brothers, has no warehouse, no storage space, office or place of business in the District of Columbia, and does no business in the District of Columbia; that the said salesmen are merely drummers, and do not make collections for merchandise delivered or when orders are taken; that as to such orders, all collections are made through the Baltimore Office and only occasionally is merchandise delivered C. O. D.; that the power and authority granted to the salesmen is purely that of solicitation, and they have no power or authority to accept orders or to make contracts, or in any manner to bind the Company.

(c) That under the facts alleged, it is contended that Butler Brothers does not carry on business in the District of Columbia and is, therefore, not subject to the tax for the privilege of engaging in business.

WHEREFORE, your Petitioner prays that this Board may hear the proceeding and cancel the assessment of taxes against it, and determine that said taxes were erroneously paid by or collected from the taxpayer, so that the same may be refunded by the District of Columbia.

BUTLER BROTHERS
By L. C. BURR
Vice President
200 West Baltimore Street
Baltimore, Maryland

5 STATE OF MARYLAND,
City of Baltimore, ss:

I, L. C. Burr, being duly sworn, say that I am the Vice President of Butler Brothers, the above petitioner, and that I am authorized to verify the foregoing petition; that I have read the foregoing petition and am familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and those I believe to be true.

L. C. BURR

Subscribed and sworn to before me this 11th day of August, 1938.

HELEN G. JAMES
Notary Public

6 Endorsed: Received and Filed Nov 3 1938 Board of Tax Appeals for the District of Columbia

Opinion No. 49

Board of Tax Appeals for the District of Columbia

Docket No. 62

BUTLER BROTHERS, *Petitioner*

vs.

DISTRICT OF COLUMBIA, *Respondent*

Findings of Fact and Opinion

The Assessor of the District of Columbia assessed the petitioner, and the petitioner paid to the District of Columbia the sum of $2008.74 as a business privilege tax and penalty for the fiscal year ending June 30, 1938, under Title VI of the District of Columbia Revenue Act of 1937.

The petitioner seeks refund of such sum. It is alleged by the petitioner that the tax and penalty were assessed in error, in that the petitioner does no business in the District, and the gross receipts upon which the tax was computed were derived from transactions in interstate commerce.

The respondent filed an answer praying that the tax be increased by including in gross receipts, for computation of the tax, a portion of sales of merchandise delivered in the delivery equipment of the petitioner or C. O. D.

Findings of Fact

The petitioner is an Illinois corporation with its principal office at Chicago, Illinois. It maintains a branch office at Baltimore. It is engaged in the wholesale dry goods business.

During the calendar year 1936 the petitioner sold merchandise to customers in the District of Columbia in the amount of $601,776. Of that amount $121,505 represented sales to customers on orders obtained by mail, telephone, telegraph or in person, which for convenience will, hereinafter, be called "non-solicited orders," as distinguished
from orders solicited by salesman, subject to the ap-
7 proval of the petitioner at its Baltimore office, which
latter class will hereinafter be called "solicited orders."

Of the amount of non-solicited orders above mentioned $21,610 in amount covered merchandise shipped to customers in the District from a point without the District, other than the Baltimore office, by common carrier. The remaining non-solicited orders covered merchandise shipped from the Baltimore office by several methods of delivery.

The balance of the total amount of merchandise sold to customers in the District during the calendar year 1936, that is to say, in the amount of $480,271 was covered by solicited orders. Of such merchandise $72,407 in amount was shipped to customers in the District from a point without the District, other than the Baltimore office by common carrier. The remaining solicited orders covered merchandise shipped from the Baltimore office by several methods of delivery.

The total amount of merchandise covered by non-solicited and solicited orders and delivered to customers in the District of Columbia from the Baltimore office was in the amount of $507,759. Of that amount of merchandise so delivered from the Baltimore office merchandise in amount of $75,000 was shipped by independent trucking agencies, and the balance, in the amount of $432,759 was delivered to customers in equipment owned by the petitioner.

Of the entire amount of merchandise sold by petitioner to customers in the District of Columbia, that is to say, merchandise in the amount of $601,776, $30,000 in amount thereof was delivered C. O. D.

Whenever merchandise being delivered in the petitioner's delivery equipment is destroyed or lost the merchandise is replaced by the petitioner or the loss is borne by it on the theory that the merchandise is the property of petitioner until it is delivered.

The petitioner's cost of selling merchandise in the District of Columbia during the calendar year 1936 was three and one-half per centum of the selling price thereof; and the cost of delivery was one and one-half per centum of the selling price thereof.

On May 31, 1938, under protest, the petitioner filed
8 its amended return of gross receipts, showing "Estimated gross receipts from sales made on orders solicited by traveling salesmen in the District of Columbia" in the amount of $480,721. Thereupon the Assessor assessed a tax equal to two-fifths of one per centum of such gross receipts, less an exemption of $2,000, or a tax of $1913.08, and duly notified the petitioner. On June 10, 1938, the petitioner paid the tax, together with a penalty of $95.66 or a total of $2008.74, under protest in writing.

This proceeding was filed on August 17, 1938.

The fair and adequate apportionment of the gross receipts of the petitioner is as follows: (a) with respect to non-solicited orders covering merchandise delivered in the delivery equipment of the petitioner or C. O. D., there should be allocated to the District of Columbia so much of the selling price as represents the cost of delivery; (b) with respect to solicited orders covering merchandise delivered by common carrier, there should be allocated to the District so much of the selling price that represents the cost of selling the merchandise, and (c) with respect to solicited orders covering merchandise delivered in the delivery equipment of the petitioner or C. O. D., there should be allocated to the District the cost of selling and delivering the merchandise. No other receipts should be taxed.

Opinion

The principal involved and the facts in this case are substantially the same as those involved in *Consolidated Expanded Metals Companies v. District of Columbia,* D. C. B. T. A., Docket No. 2; and the consideration of the questions of law raised by this appeal is controlled by the opinion of the Board in that proceeding. It, therefore, follows that the gross receipts must be apportioned on the basis determined in the Findings of Fact herein to be fair and adequate.

The Board will withhold its decision under Rule 33 for the purpose of permitting the parties to submit computations pursuant to the Board's determination of issues and the fair and adequate method of apportionment showing allocation of gross receipts and the amount of tax collected from the petitioner.

9 Decision will be entered under Rule 33.

JO V. MORGAN
Member Sole

November 3, 1938.

10 Endorsed: Received and Filed Nov 8 1938 Board of Tax Appeals for the District of Columbia

Opinion No. 49A

Board of Tax Appeals for the District of Columbia

Docket No. 62

BUTLER BROTHERS, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

Memorandum

The Board being of the opinion that the formula of the apportionment set forth in the Findings of Fact in this proceeding is not fair and adequate, such formula is redetermined and the last paragraph of the Findings of Fact is amended to read as follows:

"The fair and adequate apportionment of the gross receipts of the petitioner is as follows: (a) with respect to non-solicited orders covering merchandise delivered in the delivery equipment of the petitioner or C. O. D., there should be allocated to the District of Columbia so much of the selling price as represents the cost of delivery; (b) with respect to solicited orders covering merchandise delivered by common carrier, there should be allocated to the District so much of the selling price that represents the cost of selling the merchandise, and one-half of the difference between the gross receipts and the costs of selling the merchandise, and (c) with respect to solicited orders covering merchandise delivered in the delivery equipment of the petitioner or C. O. D., there should be allocated to the District the costs of selling and delivering the merchandise, and one-half of the difference between the costs of selling and delivering the merchandise. No other receipts should be taxed."

JO V. MORGAN
Member Sole

November 8, 1938

11 Endorsed: Received and Filed Jan 3 1939 Board of Tax Appeals for the District of Columbia

Board of Tax Appeals for the District of Columbia

Docket No. 62

BUTLER BROTHERS, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

Decision

This proceeding came on to be heard upon the petition filed herein, and upon consideration thereof and of the evidence adduced at the hearing on said petition, it is by the Board this third day of January, 1939

ADJUDGED AND DETERMINED, that a business privilege tax and penalty for the fiscal year ending June 30, 1938, in the total sum of $920.11 was erroneously collected from the petitioner by the District of Columbia, and that said petitioner is entitled to a refund of said total sum.

JO V. MORGAN
Member Sole

12 Endorsed: Received and Filed Feb 1 1939 Board of Tax Appeals for the District of Columbia

Board of Tax Appeals for the District of Columbia

Docket No. 62

BUTLER BROTHERS, *Petitioner*
v.
DISTRICT OF COLUMBIA, *Respondent*

Petition of Taxpayer for Review by the United States Court of Appeals for the District of Columbia of a Decision by the Board of Tax Appeals for the District of Columbia

Butler Brothers, the petitioner in this cause, by Bradley T. J. Mettee, Jr., counsel, hereby files its petition for a review by the United States Court of Appeals for the District of Columbia of the decision of the Board of Tax Appeals for the District of Columbia, rendered January 3, 1939, determining that business privilege taxes were lawfully assessed against the petitioner by the Assessor of the District of Columbia and collected from it by the Collector of Taxes of the District of Columbia for the fiscal year 1938, in the amount of $1,036.79, with interest and penalty of $51.84, or a total of $1,088.63.

I

The petitioner is a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business in Chicago, Illinois, and with a branch office or place of business at 200 West Baltimore Street, Baltimore, Maryland.

II

Nature of Controversy

(a) The controversy involves the question of whether or not the petitioner is subject to the business privilege tax,

and if it is found to be subject to the tax, whether or not the tax so applied is constitutional. The question is presented as a contest of the validity of the assessment
13 and collection by the assessing and collecting authorities of the District of Columbia of a business privilege tax for the fiscal year 1938.

(b) The petitioner is engaged in the wholesaling of dry goods and general merchandise, and conducts its business from its office or place of business in Baltimore, Maryland as follows:

Salesmen are sent from the said office into the territory covered by said branch, including the States of Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, West Virginia, and parts of Pennsylvania, Tennessee and Kentucky, as well as into the District of Columbia, and such salesmen solicit orders for merchandise, which orders are sent to the office at Baltimore for investigation of credit and for acceptance or rejection. If such orders are accepted at the office in Baltimore, the merchandise is shipped, pursuant to the contract so made at Baltimore, from the store or warehouse in Baltimore, or in some instances direct from a factory or warehouse, no such factory or warehouse being located in the District of Columbia, by trucks of Butler Brothers, by independent trucking agencies, by parcel post, or by rail to the purchasers. When shipments are made by trucks of Butler Brothers, such trucks come into the District of Columbia, make their deliveries and immediately leave. In addition to orders received through the salesmen, orders are frequently received at Baltimore by telephone, telegraph, or by mail. Such orders as are accepted are accepted and filled in the same manner as set forth above. In addition to the foregoing, customers frequently come to the place of business in Baltimore of Butler Brothers and place orders in person. Delivery of such orders is made, in addition to the manner set forth above, in some instances directly to the purchasers, who, themselves, transport the goods to their places of business in the District of Columbia and elsewhere. The petitioner, Butler Brothers, has no warehouse, no storage space, office or place of business in the District of Columbia, and does no business in the District of Columbia; that the said salesmen are merely drummers, and do not make

collections for merchandise delivered or when orders are taken; that as to such orders, all collections are made
14 through the Baltimore Office and only occasionally is merchandise delivered C. O. D.; that the power and authority granted to the salesmen is purely that of solicitation, and they have no power or authority to accept orders or to make contracts, or in any manner to bind the Company.

(c) In its return on gross receipts for taxation purposes for the fiscal year 1938, the petitioner reported the estimated gross receipts derived from sales made on orders solicited by traveling salesmen in the District of Columbia, but claimed that it was not liable for taxes thereon in the District of Columbia for the reason that it was engaged in interstate commerce and did no local business in the District of Columbia. The Assessor of the District held that the petitioner was subject to taxation on said gross receipts, and assessed a tax of $1,913.08 plus interest and penalties of $95.66, or a total of $2,008.74 against the petitioner thereon, and notified the petitioner of such assessment on June 6, 1938. The petitioner paid said tax to the Collector of Taxes of the District of Columbia under protest in writing on June 10, 1938, and appealed from said assessment to the Board of Tax Appeals.

(d) The Board of Tax Appeals, on hearing said appeal, rendered its findings of fact and opinion to the effect that the petitioner was engaged in business within the District of Columbia and was therefore subject to the tax on the privilege of doing business, but that the tax assessed was in excess of the correct tax, and that computations should be submitted so that the correct amount of tax could be arrived at. Such computations were submitted, and on January 3, 1939 the Board rendered its decision to the effect that the tax was overpaid to the extent of $920.11, and that the correct tax should have been $1,036.79 plus penalty of $51.84, or a total of $1,088.63.

III

The petitioner, being aggrieved by the findings of fact and conclusion of law contained in said findings and opinion of the Board of Tax Appeals, and by its decision entered in pursuance thereto, desires to obtain a review thereof by the United States Court of Appeals for the District of Columbia.

15 IV

Assignments of Error

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

(1) The holding that the petitioner was engaged in business in the District of Columbia;

(2) The holding that a portion of the business privilege tax assessed against the petitioner was lawfully assessed against the petitioner and collected from it;

(3) The failure to cancel the assessment of business privilege tax against the petitioner in its entirety;

(4) The failure to hold that the business privilege tax assessed against the petitioner was, in its entirety, erroneously paid by and collected from the petitioner.

V

Designation of Record

The Clerk of the Board of Tax Appeals is requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the District of Columbia with reference to this petition, a transcript of the record in the above entitled cause, prepared and transmitted as required by law and by the rules of the said Court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals;

(2) Pleadings before the Board;

(3) Findings of fact and amendment and opinion of the Board of Tax Appeals;

(4) Decision of the Board of Tax Appeals;

(5) The petition for review filed by the petitioner in the above case;

(6) Notice of filing petition for review;

(7) Statement of evidence.

BRADLEY T. J. METTEE, JR.
Counsel for Petitioner
2500 Baltimore Trust Building
Baltimore, Md.

16 District of Columbia, *ss:*

Bradley T. J. Mettee, Jr., being duly sworn, says that he is counsel of record in the above cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

BRADLEY T. J. METTEE, JR.

Subscribed and sworn to before me this 31st day of January, 1939.

HELEN G. JAMES
Notary Public

17 Endorsed: Received and Filed Feb 1 1939 Board of Tax Appeals for the District of Columbia

Board of Tax Appeals for the District of Columbia

Docket No. 62

Butler Brothers, *Petitioner*

v.

District of Columbia, *Respondent*

Notice of Filing Petition for Review

TO: Glenn Simmon, Esquire,
Assistant Corporation Counsel of the District of Columbia

District Building
Washington, D. C.,
Counsel for the Respondent:

Please take notice that the petitioner on February 1, 1939 filed with the Clerk of the Board of Tax Appeals for the District of Columbia a petition for review by the United States Court of Appeals for the District of Columbia of the decision of the Board heretofore rendered in the above cause. A copy of the petition for review, which includes the assignments of error and the designation of record, as filed, is hereto attached and served upon you.

Dated this 1st day of February, 1939.

BRADLEY T. J. METTEE, JR.
Counsel for Petitioner
2500 Baltimore Trust Building
Baltimore, Md.

Service of the foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 1st day of February, 1939.

GLENN SIMMON
Assistant Corporation Counsel
of the District of Columbia,
Counsel for the Respondent

18 Endorsed: Received and Filed Feb 18 1939 Board of Tax Appeals for the District of Columbia

Board of Tax Appeals for the District of Columbia

Docket No. 62.

BUTLER BROTHERS, *Petitioner*
vs.
DISTRICT OF COLUMBIA, *Respondent*

Supplemental Designation of Record

In addition to the documents or certified copies thereof to be included in the Transcript of Record in the above-entitled cause at the request of the petitioner herein, the Clerk of the Board of Tax Appeals is requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the District of Columbia, along with other documents included in said Transcript of Record, the following documents or certified copies thereof, to-wit:

8. Letter dated December 27, 1938, from Bradley T. J. Mettee, Jr., addressed to Mr. Jo. V. Morgan, Board of Tax Appeals for the District of Columbia, received and filed December 28, 1938.

9. Computation of tax received and filed December 28, 1938.

GLENN SIMMON,
Assistant Corporation Counsel, D. C.
Counsel for Respondent.

19 Endorsed: Received and Filed Dec 28 1938 Board of Tax Appeals for the District of Columbia

Board of Tax Appeals for the District of Columbia

Docket No. 62.

BUTLER BROTHERS, *Petitioner*
vs.
DISTRICT OF COLUMBIA, *Respondent*

Computation of Tax

(a) Total "non-solicited" orders	$121,505.00	
Outside shipments	21,610.00	
"Non-solicited" orders delivered in equipment of petitioner	99,895.00	
Apportionment of C. O. D. orders	15,000.00	
	$114,895.00	
Percentage of selling price representing cost of delivery	.015	
	1,723.43	$1,723.43
(b) Solicited orders	$480,271.00	
Less deliveries by common carrier	72,407.00	
	$407,864.00	
Plus apportioned C. O. D. orders	15,000.00	
	$422,864.00	
Less selling and delivery expense	21,143.00	
	$401,721.00	
Less one-half	200,860.50	
	$200,860.50	
Plus selling and delivery expense	21,143.00	222,003.50
(c) Solicited orders delivered by common carrier	72,407.00	
Less selling expense	2,534.25	
	69,872.75	
Less one-half	34,936.37	
	34,936.38	
Plus selling expense	2,534.25	37,470.63
Total gross receipts to be allocated to D. C.		$261,197.56
Less exemption		2,000.00
		259,197.56
Tax at 2/5 of 1% due		1,036.79
Plus penalties for late payment, 7% first half, 3% second half		51.84
		$1,088.63
Total tax and penalties paid		2,008.74
REFUND DUE		$920.11

20 Endorsed: Received and Filed Mar 3 1939
Board of Tax Appeals for the District of Columbia.

Board of Tax Appeals for the District of Columbia

Docket No. 62

BUTLER BROTHERS, *Petitioner*

vs.

DISTRICT OF COLUMBIA, *Respondent*

Statement of Evidence.

Following is a statement of evidence submitted to the Board of Tax Appeals for the District of Columbia in the above case, so far as necessary to the assignments of error as filed, reduced to narrative form.

The petitioner is an Illinois corporation with its principal office at Chicago, Illinois. It maintains a branch office at Baltimore. It is engaged in the wholesale dry goods business.

During the calendar year 1936 the petitioner sold merchandise to customers in the District of Columbia in the amount of $601,776. Of that amount $121,505 represented sales to customers on orders obtained by mail, telephone, telegraph or in person, which for convenience will, hereafter, be called "non-solicited orders", as distinguished from orders solicited by salesmen, subject to the approval of the petitioner at its Baltimore office, which latter class will hereinafter be called "solicited orders".

Of the amount of non-solicited orders above mentioned $21,610 in amount covered merchandise shipped to customers in the District of Columbia from a point without the District, other than the Baltimore office, by common carrier. The remaining non-solicited orders covered merchandise shipped from the Baltimore office by several methods of delivery.

The balance of the total amount of merchandise sold to customers in the District during the calendar year 1936, that is to say, in the amount of $480,271 was covered by solicited orders. Of such merchandise $72,407 in amount was shipped to customers in the District from a point with-

out the District, other than the Baltimore office, by
21 common carrier. The remaining solicited orders covered merchandise shipped from the Baltimore office by several methods of delivery.

The total amount of merchandise covered by non-solicited and solicited orders and delivered to customers in the District of Columbia from the Baltimore office was in the amount of $507,759. Of that amount of merchandise so delivered from the Baltimore office merchandise in amount of $75,000 was shipped by independent trucking agencies, and the balance, in the amount of $432,759, was delivered to customers in equipment owned by the petitioner.

Of the entire amount of merchandise sold by petitioner to customers in the District of Columbia, that is to say, merchandise in the amount of $601,776, $30,000 in amount thereof was delivered C. O. D.

Whenever merchandise being delivered in the petitioner's delivery equipment is destroyed or lost, the merchandise is replaced by the petitioner or the loss is borne by it on the theory that the merchandise is the property of petitioner until it is delivered.

The petitioner's cost of selling merchandise in the District of Columbia during the calendar year 1936 was three and one-half per centum of the selling price thereof; and the cost of delivery was one and one-half per centum of the selling price thereof.

On May 31, 1938, under protest, the petitioner filed its amended return of gross receipts, showing "Estimated gross receipts from sales made on orders solicited by traveling salesmen in the District of Columbia" in the amount of $480,721. Thereupon the Assessor assessed a tax equal to two-fifths of one per centum of such gross receipts, less an exemption of $2,000, or a tax of $1913.08, and duly notified the petitioner. On June 10, 1938, the petitioner paid the tax, together with a penalty of $95.66, or a total of $2008.74, under protest in writing.

The petitioner has no office, place of business, warehouse or storage space in the District of Columbia. Billings are made in the Baltimore office. The Salesmen do not make collections when orders are taken, and have no authority to accept orders. All orders are taken subject to
22 acceptance or rejection at the Baltimore office.

This proceeding was filed on August 17, 1938.

The Board of Tax Appeals made its findings of fact in accord with the foregoing and ruled thereon by its amended ruling as follows:

The fair and adequate basis of apportionment of the gross receipts of the petitioner is as follows: (a) with respect to non-solicited orders covering merchandise delivered in the delivery equipment of the petitioner or C. O. D., there should be allocated to the District of Columbia so much of the selling price as represents the cost of delivery; (b) with respect to solicited orders covering merchandise delivered by common carrier, there should be allocated to the District so much of the selling price as represents the cost of selling the merchandise, plus one-half of the difference between the gross receipts and the cost of selling the merchandise, and (c) with respect to solicited orders covering merchandise delivered in the delivery equipment of the petitioner or C. O. D., there should be allocated to the District the cost of selling and delivering the merchandise, plus one-half of the difference between the gross receipts and the cost of selling and delivering the merchandise. No other receipts should be taxed.

BRADLEY T. J. METTEE, JR.,
Attorney for Petitioner.

GLENN SIMMON
Atty. for Respondent

23 Endorsed: Received and Filed Mar 11 1939 Board of Tax Appeals for the District of Columbia.

Board of Tax Appeals for the District of Columbia

Docket No. 62

BUTLER BROTHERS, *Petitioner,*

vs.

DISTRICT OF COLUMBIA, *Respondent.*

Comes now the petitioner, Butler Brothers, by its counsel, and the District of Columbia, by its counsel, and stipulates that, without prejudice to the contentions of Butler

Brothers, the computation of tax prepared by counsel for the District of Columbia and filed herein on or about December 28, 1938, is in accordance with the ruling made by the Board of Tax Appeals.

BRADLEY T. J. METTEE, JR.,
Counsel for Petitioner

GLENN SIMMON,
Counsel for Respondent.

True Copy Test:
PHYLLIS A. RAGUSA
Clerk

(Seal)

24 Endorsed: Received and Filed Mar 13 1939 Board of Tax Appeals for the District of Columbia.

Board of Tax Appeals for the District of Columbia

Docket No. 62.

BUTLER BROTHERS, *Petitioner,*

vs.

DISTRICT OF COLUMBIA, *Respondent.*

Supplemental Designation of Record

The Clerk of the Board of Tax Appeals for the District of Columbia is requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the District of Columbia, along with other documents included in the Transcript of Record, the original or a certified copy of Stipulation filed on March 11, 1939.

The Clerk is requested to omit from said Transcript the letter of Bradley T. J. Mettee, Jr., dated December 27, 1938, heretofore designated.

GLENN SIMMON,
Assistant Corporation Coun., D. C.
Counsel for Respondent.

Endorsed on Cover: No. 7371. Butler Brothers, Petitioner, vs. District of Columbia. United States Court of Appeals for the District of Columbia Filed Mar 23 1939 Joseph W. Stewart, Clerk.

NO. 7371.

IN THE

United States Court of Appeals for the District of Columbia

JUNE TERM, 1939.

BUTLER BROTHERS,
Petitioner,

against

DISTRICT OF COLUMBIA,
Respondent.

PETITION TO REVIEW DECISION OF THE BOARD OF TAX APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF OF PETITIONER.

BRADLEY T. J. METTEE, JR.,
Attorney for Petitioner.

The Daily Record Co. Print, Baltimore.

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BRIEF OF PETITIONER.

This is a petition to review the decision of the Board of Tax Appeals for the District of Columbia rendered January 3, 1939, in which the Board determined that business privilege taxes were lawfully assessed against the petitioner by the Assessor of the District of Columbia and collected from it by the Collector of Taxes of the District of Columbia for the fiscal year 1938 (ending June 30, 1938) in the amount of $1,036.79 with interest and penalty of $51.84 or a total of $1,088.63.

STATEMENT OF CASE.

This case involves the construction and application of Title VI of the District of Columbia Revenue Act of 1937 as originally enacted (Public Law No. 314, 75th Congress approved August 17, 1937). The particular question raised is whether or not the petitioner which does no local business is subject to the business privilege tax, and if it is found to be subject to the tax, whether or not the tax so applied is constitutional. The question is presented as a contest of the validity of the assessment and collection by the assessing and collecting authorities of the District of Columbia of a business privilege tax for the fiscal year 1938.

ASSIGNMENT OF ERRORS.

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

(1) The holding that the petitioner was engaged in business in the District of Columbia;

(2) The holding that a portion of the business privilege tax assessed against the petitioner was lawfully assessed against the petitioner and collected from it;

(3) The failure to cancel the assessment of business privilege tax against the petitioner in its entirety;

(4) The failure to hold that the business privilege tax assessed against the petitioner was, in its entirety, erroneously paid by and collected from the petitioner.

JURISDICTION.

Section 4 (a) of Title IX of the Act of May 16, 1938 states that the decision of the Board of Tax Appeals may be reviewed by the Court, and, by Section 1 of said Act, the word "court" is stated to mean the United States Court of Appeals for the District of Columbia. Section 4 (a) further provides that the petition for review must be filed within thirty days after the decision. The decision as will appear from the record (p. 9) was made January 3, 1939 and the petition for review was filed February 1, 1939 (R. p. 10). Section 4 (a) further provides that upon such review the court shall have power to affirm, modify or reverse the decision of the Board with or without remanding the case for hearing.

FACTS.

The petitioner is engaged in the wholesaling of dry goods and general merchandise, and conducts its business from its office or place of business in Baltimore, Maryland, by sending salesmen from said office into the territory covered by said branch, including the States of Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, West Virginia, and parts of Tennessee, Pennsylvania and Kentucky, as well as into the District of Columbia. Such salesmen solicit orders for merchandise, which orders are sent to the office at Baltimore for investigation of credit and for acceptance or rejection. If such orders are accepted at the office in Baltimore, the merchandise is shipped, pursuant to the contract so made at Baltimore, from the store or warehouse in Baltimore, or in some instances direct from a factory or warehouse located elsewhere, but no such factory or warehouse being located in the District of Columbia, by trucks of Butler Brothers, by independent trucking agencies, by parcel post, or by rail to the purchasers. When shipments are made by trucks of Butler Brothers, such trucks come into the District of Columbia, make their deliveries and immediately leave. In addition to orders received through salesmen, orders are frequently received at Baltimore by telephone, telegraph, or by mail and such orders, if accepted, are filled in the same manner as set forth above. In addition, customers frequently come to the place of business in Baltimore of Butler Brothers and place orders in person. Delivery of such orders is made, in addition to the manner set forth above, in some instances directly to the purchasers who, themselves, transport the goods to their places of business in the District of Columbia or elsewhere. The petitioner, Butler Brothers, has no warehouse, no storage space, office or place of business in the District of Columbia and does no business in the District of Columbia. The salesmen are merely drummers and have no power or authority to accept orders or to make contracts or in any manner to bind the Company. The salesmen have no authority to make collections for merchandise delivered, or when orders are taken. All collections are made through the Baltimore office and only occasionally is merchandise delivered C.O.D.

In its return on gross receipts for taxation purposes for the fiscal year 1938, the petitioner reported the estimated gross receipts derived from sales made on orders solicited by traveling salesmen in the District of Columbia, but claimed that it was not liable for taxes thereon in the District of Columbia for the reason that it was engaged in interstate commerce and did no local business in the District of Columbia. The Assessor of the District held that the petitioner was subject to taxation on said gross receipts, and assessed a tax of $1,913.08 plus interest and penalties of $95.66, or a total of $2,008.74, against the petitioner thereon, and notified the petitioner of such assessment on June 6, 1938. The petitioner paid said tax to the Collector of Taxes of the District of Columbia under protest in writing on June 10, 1933, and appealed from said assessment to the Board of Tax Appeals.

The Board of Tax Appeals, on hearing said appeal, rendered its finding of fact and opinion to the effect that the petitioner was engaged in business within the District of Columbia and was therefore subject to the tax on the privilege of doing business, but that the tax assessed was in excess of the correct tax, and that computations should be submitted so that the correct amount of tax could be arrived at. Such computations were submitted, and on January 3, 1939 the Board rendered its decision to the effect that the tax was overpaid to the extent of $920.11, and that the correct tax should have been $1,036.79 plus penalty of $51.84, or a total of $1,088.63.

ARGUMENT.

THE TAX IS A TAX ON GROSS RECEIPTS.

Although the tax in controversy is called a business privilege tax, it is nevertheless a tax not only measured by, but actually upon, gross receipts. The fact that the tax is stated to be "equal to" two-fifths of one per centum of the gross receipts, in excess of $2,000.00, is immaterial, the tax is directly upon, rather than measured by, gross receipts. In the case of *Galveston, Harrisburg, etc. Ry. Co. vs. Texas,* 210 U. S. 217 at 227, Justice Holmes said:

> "The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the

former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone."

WITHIN THE MEANING OF THE COMMERCE CLAUSE, THE DISTRICT OF COLUMBIA IS TO BE TREATED AS A STATE.

The commerce clause of the Constitution, Article 1, Section 8, Clause 3 reads:

> "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes;"

By the Tenth Amendment to the Constitution, it is provided:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people."

The powers of Congress are thus limited to those specifically delegated. If the District is not to be treated as a State, Congress has no right to regulate commerce between it and a state. We need only show that petitioner's business was between a State by its citizens or others with the District of Columbia. However, in the case of *Stoutenburgh vs. Hennick,* 129 U. S. 141, at 147-148, the Supreme Court, speaking of a similar Act and its enforcement, said:

> "But it is indistinguishable from that held void in *Robbins vs. Shelby Taxing District,* 120 U. S. 489, and *Asher vs. Texas,* 128 U. S. 129 as being a regulation of interstate commerce so far as applicable to persons soliciting, as Hennick was, the sale of goods on behalf of individuals or firms doing business outside the District".

This, when read with the dissenting opinion in the case, was a definite determination by the majority decision that the District of Columbia was to be treated as a State.

In the case of *District Grocery Stores vs. District of Columbia,* 24 F. Supp. 447, the only case reported involving the construction of this statute, the Court there so interpreted the decision in the aforementioned case, saying:

> "There may be some question whether the District of Columbia is a state within the meaning of the provision of the Constitution giving Congress the power to regulate commerce between the states, U. S. C. A. Const. art. 1, sec. 8, cl. 3, but in the case of *Stoutenburgh v. Hennick,* 129 U. S. 141, 9 S. Ct. 256, 32 L. Ed. 637, the Supreme Court apparently assumed that commerce between the District of Columbia and one of the states came within that provision of the Constitution. That the question was raised is shown by the dissenting opinion of Justice Miller who dissented on the ground that such commerce was not commerce 'among the several states'."

It is felt that this is a proper interpretation of the decision.

In *Potomac Electric Power Co. vs. Hazen,* 90 F. (2nd) 406 at 407, this Court said:

> "The appellees insist that the tax is a franchise tax measured by gross earnings, and not a tax upon gross earnings. They concede as they must that a tax on gross earnings derived from interstate commerce is a burden upon that commerce and repugnant to the commerce clause." (Cases cited.)

PETITIONER'S METHOD OF DOING BUSINESS CONSTITUTES INTERSTATE COMMERCE.

We have shown that within the meaning of the commerce clause the District of Columbia is to be treated as a State. Interstate commerce or "commerce among the States" has been defined in *Groves vs. Slaughter*, 15 Pet. (U. S.) 449, at 511, as:

> * * * "trade, traffic, intercourse and dealing in articles of commerce between States by its citizens or others, and carried on in more than one State."

In the case of *Cheney Brothers Co. vs. Massachusetts*, 246 U. S. 147-153, the facts were that there was a Connecticut corporation maintaining a selling office in Boston with one office salesman and four other salesmen who traveled through New England, soliciting orders subject to approval by the home office in Connecticut, shipments being direct to the purchasers. No stock of goods was kept in Boston and the office made no collections. The facts thus are similar to the present case, except that Butler Brothers does not even *maintain* an office in the District of Columbia.

The Supreme Court said of such activity:

> "We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the Company's interstate business and have no other purpose. Like the employment of the salesman they are among the means by which that business is carried on and share its immunity from state taxation." (cases cited).

See, also:

International Text Book vs. Pigg, 217 U. S. 91, 106, 107.

It is true that Butler Brothers makes deliveries by its own trucks, as well as by independent trucking agencies and otherwise, but this fact does not remove the sale from being in interstate commerce. See *City of Lee's Summit vs. Jewel Tea Co.*, 217 Fed. Rep. 965. *Stewart vs. Michigan*, 232 U. S. 665. *Crenshaw vs. Arkansas*, 227 U. S. 389. *Robbins vs. Shelby County*, 120 U. S. 489. *Rossi vs. Pennsylvania*, 238 U. S. 62.

It is the *importation* of the goods from outside the State as ordered by purchasers that constitutes the transaction interstate commerce. In the *Rossi case* cited above, Rossi took an order in Pennsylvania, returned to Ohio, there loaded the goods on his wagon and either by himself or his employes drove across the state line and delivered the liquor to the residence of the purchaser in Pennsylvania. This was held to be a transaction in interstate commerce. See also the case of *Norfolk & Western Ry. Co. vs. Sims*, 191 U. S. 441, at 446, wherein the court said:

> "To the ordinary mind it seems a somewhat startling proposition that a manufacturing corporation, located and doing its main business in a distant city, having no manufactory in North Carolina, no stock in trade, no place for the sale of its goods there, and no agent authorized to sell them, can be compelled to take out a license required of all those 'engaged in the business of selling', from the mere fact that it had done what hundreds of others were doing daily —sent a single machine there upon a written order of a customer and under an ordinary C.O.D. consignment. If this may be done, the revenues of every State may be largely increased by adopting a similar system, since a large part of the business of retail shops in the principal cities is done by orders received, filled and the goods delivered in the same way. Of course, it is impossible to estimate the

number of business houses in other States which are accustomed to collect their accounts in this manner.

"If this were the law it would also follow that the consignor of every cargo of wheat sent to New York for export under a bill of lading, accompanied by a draft for the payment of the money in the usual method, might be compelled to take out a license in the State of New York as a dealer in produce, notwithstanding that all the real business was done in Chicago or North Dakota."

We believe that the method of doing business practiced by petitioner, on the authority of these cases, constitutes interstate commerce.

AS THE GROSS RECEIPTS DERIVED FROM INTERSTATE COMMERCE WERE SUBJECTED TO THE TAX, THE TAX IS UPON INTERSTATE COMMERCE.

In the case of *Philadelphia Steamship Company vs. Pennsylvania,* 122 U. S. 326, involving a state tax upon gross receipts of a steamship company, it was held, at 342:

> "If such a tax is laid and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted whether at the time of realizing the receipts or at the end of every six months or a year, it is an exaction aimed at the commerce itself and is a burden upon it, and seriously affects it."

And in the case of *Sonneborn Bros. vs. Cureton,* 262 U. S. 506, at 515, the Court says:

> "So too a tax upon the gross receipts from interstate transportation or transmission, whether receipts from intrastate transportation or transmission are equally taxed or not, is an unlawful tax because a direct burden upon interstate commerce."

And in *Matson Nav. Co. vs. State Board,* 297 U. S. 441, at 444:

> "Our decisions demonstrate that a state tax on gross earnings derived from interstate commerce is a burden upon that commerce and repugnant to the commerce clause."

The courts have frequently held that a state tax imposed upon receipts from interstate commerce, is a burden on the commerce, and therefore is not lawful.

CONGRESS HAS NO POWER OR AUTHORITY TO LAY A TAX OF THIS CHARACTER.

Although it might be argued that Congress did not intend in this enactment to tax any gross receipts except those derived from business *in* the District of Columbia, the construction placed upon the Act by the taxing officials and by the Board of Tax Appeals is to the contrary. If it were to be decided by this Court that Congress did not intend to tax gross receipts from business other than business in the District of Columbia, gross receipts derived from interstate commerce would not be from business in the District of Columbia and would not be subject to the tax, and the decision of the Board must be reversed.

In the case of *Beitzell vs. District of Columbia,* 21 App. D. C. 49, in which the Act of July 1, 1902 was involved, it was held that the Act applied only to local business. The Act provided a general license system for the District of Columbia, to the effect that no person should engage in, or carry on, any business, trade, profession or calling in the District of Columbia for which a license was imposed, without first having obtained a license so to do. The Court held this applied only to local business, saying:

"That Congress has express power given by the Constitution 'to exercise exclusive legislation in all cases whatsoever' over the District of Columbia, thus combining the powers of the general and of a State government in all cases where legislation is proper, admits of no question. But whether Congress intended by the provisions of the Act of July 1, 1902, just quoted, to authorize the Municipal authorities of the District of Columbia to tax agents representing the owners of property and business *outside* of the District for the privilege of *soliciting orders* within it, as agents of such owners for property to be shipped to persons within the District is a question of very great doubt. This, it would seem, is the nature of the business agency of the defendant in this case. He is a mere solicitor of orders for goods manufactured and supplies by parties outside of the District to persons within the District. It is true, the terms of the particular provision of the Act in question are general and might, possibly, be susceptible of the broad construction contended for in support of the prosecution in this case were such construction consistent with settled principles of interstate commercial regulations. Doubtless the Congress that passed the Act in question was aware of the decisions of the Supreme Court of the United States made in the cases of Robbins v. Shelby Taxing District, 120 U. S. 489; Stoutenburgh v. Hennick, 129 U. S. 141, and the very recent case of Stockhard v. Morgan, 185 U. S. 27, and to declare that it was the intention of Congress by the provisions of the Act under consideration that it should be lawful for the authorities of this District to impose a license tax upon soliciting agents of nonresident merchants of orders from persons resident in the District, to be filled and supplied to such resident persons, would be in utter disregard of the principle decided by those and many other cases. * * *

"The Act in question was not intended to regulate in any sense, the commercial intercourse between the District of Columbia and the States of the Union;

> nor was it intended to affect in any manner the agencies employed in such commerce. It is purely a local act and intended to have local operation only."

Attention might be called at this point to the fact that the Revenue Act of 1937 under which the instant tax was imposed has since been amended to apply to business "in any commerce whatsoever in the District", and the necessity for such an amendment or addition strongly supports a conclusion that the law as originally enacted did not indicate the intention of Congress to tax interstate commerce.

However, if Congress did intend to tax gross receipts derived from interstate commerce, it has no power to do so in this manner, for the benefit of one locality, whether it be the District of Columbia or the State of Maryland.

As has already been said: "Congress under the Constitution has the right to regulate commerce among the several states and with the Indian Tribes." (Const. Art. 1, Sec. 8, Clause 3). But it may well be argued that this power does not include the right to regulate commerce between a state and the District of Columbia. See *U. S. v. Whelpley,* 125 Fed. 616, and *Trademark cases,* 100 U. S. 96, where it is said:

> "When therefore Congress undertakes to enact a law which can only be valid as a regulation of commerce it is reasonable to expect to find on the face of the law or from its essential nature that there is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes. If not so limited it is in excess of the power of Congress."

See, also *Hepburn vs. Ellzey,* 2 Cranch 445 at 452, wherein Chief Judge Marshall said:

> "On the part of plaintiffs it has been urged that Columbia is a distinct political society; and is there-

fore 'a state' according to the definitions of writers on general law. This is true. But as the act of Congress obviously uses the word 'state' in reference to that term as used in the Constitution it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy only are the states contemplated in the Constitution." (See also annotations to the U. S. C. A. on this point).

Assume for the moment that Congress has the right to regulate commerce. A study of the reasons beyond this delegation of power to Congress indicates an intention on the part of the States to invest this power in Congress to assure uniformity throughout the United States. If this power had been retained by the States, tariffs, duties, etc., could have been imposed by the respective States on imports or on exports, or on commerce passing through a particular State or other States. Bearing in mind the reason for this delegation of power any construction which operates to defeat the intent and purpose of the delegation of power nullifies the point desired to be achieved.

Certainly even if Congress has the right to regulate commerce it is only with certain limitations. Does Congress have the right to say that all merchandise passing from Maryland to Virginia should be subject to an inspection, or should be held up for a period of forty-eight hours, or to say that a tax of 2% should be paid on the value thereof? This is a regulation of commerce among the several States but it is not within the power granted to Congress. Does Congress have the right to impose duties on all imports coming from foreign countries, with an exemption on imports coming in through the District of Columbia, from the payment of such duties? This would be a regulation of commerce with foreign nations, but would not be within the power of Congress.

Further argument on this point might be made. Congress undoubtedly has the right to lay and collect taxes, duties, imposts and excises, but all duties, imposts and excises shall be uniform throughout the United States. (Article 1, Sec. 8, Clause 1).

The uniformity required is geographic uniformity.

In *Knowlton vs. Moore,* 178 U. S. 41-84, it was said:

> "Whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States."

See, also, *Loughborough vs. Blake,* 5 Wheat 314, at 319, where it is said:

> "The District of Columbia or the territory west of the Missouri is not less within the United States than Maryland or Pennsylvania; and it is not less necessary on the principles of our constitution that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other."

Furthermore, it must be remembered that the power to tax is fundamentally connected with protection afforded.

It was said in the case of *U. S. vs. Billings,* 190 Fed. Rep. 359, at 366:

> "As we have seen, the theory upon which taxes are levied is that the taxpayer receives back in benefits from the government the value of the taxes exacted from him. Theoretically, the benefit received should be in exact proportion to the obligation im-

posed. As a corollary to these propositions it is held that the power of the state to impose taxes is limited to property within the territorial jurisdiction because only with respect to such property is the state in a position to afford the protection and benefit due as consideration for the tax imposed."

In the instant case much of the merchandise delivered to purchasers in the District of Columbia came from Baltimore, Maryland, where it has been subjected to tax and where protection was accorded it.

The law is lacking in uniformity and violates the fifth amendment as taking property without due process of law. Section 6 of the Act reads, in part:

> "Any tax levied by the District of Columbia upon tangible personal property (other than motor vehicles) for the fiscal year 1937-1938 and paid by such taxpayer shall be credited upon the tax due under this title."

This provision operates to penalize interstate commerce in favor of local commerce. No credit is obtained by petitioner for taxes paid to the State of Maryland or to the City of Baltimore, while local merchants are entitled to credit for such taxes paid locally to the District. The law is therefore discriminatory.

In *Commonwealth vs. Hana*, 195 Mass. 262, 81 N. E. 149, it is said:

> "The defendant also contends that the statute is unconstitutional in making a discrimination in Section 19 by which a resident in a city or town in which he pays taxes upon his stock in trade and is qualified to vote shall not be required to pay any fee for his license for said city or town. * * * Even before the adoption of the fourteenth amendment, it was a settled principle of constitutional law that

statutes in regard to the transaction of business must operate equally upon all citizens who desire to engage in the business and that there shall be no arbitrary discrimination between different classes of citizens. * * *

"We see no justifiable ground under the Constitution for a discrimination in favor of residents of a city or town who pay taxes there on their stock in trade, * * *."

See, also:

Southern Ry. Co. vs. Greene, 216 U. S. 400.

If it is contended that Congress in enacting this legislation did so, not under the power granted to it by the commerce clause but under its power to legislate for the District of Columbia, Congress has still exceeded its powers.

It is admitted that Congress has the right to legislate with respect to the District of Columbia, (Article 1, Sec. 8, Clause 17), but only within certain limits. As was said in the case of *Capitol Traction Co. vs. Hof,* 174 U. S. 1, at page 5:

> "The Congress of the United States, being empowered by the Constitution 'to exercise exclusive legislation in all cases whatsoever' over the seat of the national government has the entire control of the District of Columbia for every purpose of government, national or local. It may exercise within the District all legislative powers that the Legislature of a State might exercise within the State."

In *Mattingly vs. District of Columbia,* 97 U. S. 687, at 690, it is said:

> "Congress may legislate within the District respecting the people and property therein as may the Legislature of any State over any of its subordinate municipalities."

See *Gibbons vs. District of Columbia,* 116 U. S. 404, at 407, wherein it is said, speaking of *Loughbourgh vs. Blake,* 5 Wheat. 317:

> "The point there decided was that an Act of Congress laying a direct tax throughout the United States in proportion to the census directed to be taken by the Constitution might comprehend the District of Columbia; and the power of Congress legislating as a local legislature for the District to levy taxes for District purposes only in like manner as the legislature of a state may tax the people of a state for state purposes was expressly admitted and has never since been doubted."

From the foregoing, therefore, it is contended that Congress in legislating for the District has only the power of a state legislature, and cannot therefore so burden interstate commerce, for the benefit of the District of Columbia, and that regulation of interstate commerce can only be in a form national in scope and uniform in character.

Any attempt to exercise the power in any other fashion is unconstitutional.

Art. 1, Section 9, clause 5 of the Constitution provides:

> "No tax or duty shall be laid on articles exported from any State."

Art. 1, Section 9, clause 6 of the Constitution provides:

> "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another."

In *Passenger cases,* 7 Howard, 283 at 414, this clause was said to be:

> "a limitation upon the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States."

Obviously, this tax as applied to interstate commerce bears most heavily on commerce with citizens of the adjoining states of Virginia and Maryland and ends entire commercial equality within the United States.

The fifth amendment guaranteeing due process of law applies to the District of Columbia.

Rassmussen vs. United States, 197 U. S. 516, 526:

> "Without attempting to examine in detail the opinions in the various cases in our judgment it clearly results from them that they substantially rested upon the proposition that where territory was a part of the United States the inhabitants thereof were entitled to the guarantee of the Fifth, Sixth and Seventh amendments, and that the act or acts of Congress purporting to extend the Constitution were considered as declaratory of a result which existed independently by the inherent operation of the Constitution."

See also *Callan vs. Wilson,* 127 U. S. 540, concerning application of jury trial provision to District of Columbia.

THERE IS NO JURISDICTION OVER PETITIONER TO SUPPORT THE IMPOSITION OF A TAX.

One more point is to be mentioned. In order to impose upon the petitioner any tax, jurisdiction must first be obtained. If the company does no local business, there is no jurisdiction.

In the case of *Alpha Portland Cement Co. vs. Massachusetts,* 268 U. S. 203, at 217, the Supreme Court said:

> "Plaintiff in error did no local business and there was no proper foundation for the excise."

and at 218:

> "The local business of a foreign corporation may support an excise measured in any reasonable way if neither interstate commerce nor property beyond the state is taxed."

And as reaffirmed in the case of *Matson Nav. Co. vs. State Board,* 297 U. S. 441, at 446:

> "There is no merit in the suggestion that failure of the act to extend to foreign corporations exclusively engaged in interstate or foreign commerce in California constitutes an unconstitutional discrimination against appellants. A foreign corporation whose sole business in California is interstate and foreign commerce cannot be subjected to the tax in question. *Alpha Cement Co. v. Massachusetts,* 268 U. S. 203, 216 et seq. *Anglo-Chilean Nitrate Corp. v. Alabama,* supra. The submission by the State to the commerce clause cannot be held to violate the equal protection clause. *Des Moines Nat. Bank v. Fairweather,* 263 U. S. 103, 116."

CONCLUSION.

There is then no basis for jurisdiction over petitioner. No theory of allocation or apportionment could be applied until jurisdiction is first obtained. There being no local business such jurisdiction cannot be obtained. There is therefore no ground upon which this tax can be held to apply to petitioner and still be constitutional. It is, therefore, requested that the decision of the Board of Tax Appeals be reversed.

Respectfully submitted,

BRADLEY T. J. METTEE, JR.,
Attorney for Petitioner.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

JANUARY TERM, 1939

No. 7371

BUTLER BROTHERS,
Petitioner,

vs.

DISTRICT OF COLUMBIA,
Respondent.

BRIEF ON BEHALF OF THE RESPONDENT

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BRIEF ON BEHALF OF THE RESPONDENT

STATEMENT OF THE CASE

This is an appeal under the provisions of Title IX of the Act of Congress entitled, "An Act to Amend the District of Columbia Revenue Act of 1937, and for other purposes," approved May 16, 1938, from a decision of the Board of Tax Appeals for the District of Columbia.

The business privilege taxes here in question were imposed by Title VI—Tax on Privilege of Doing Business—District of Columbia Revenue Act of 1937, approved August 17, 1937, 50 Stat. 693 (Section 970, Title 20, D. C. Code 1929, Supplement III). Section 5 of Title VI provides:

> "For the privilege of engaging in business in the District of Columbia, each person so engaged shall pay to the collector of taxes of the District of Columbia for the fiscal year 1937-1938 a tax equal to two-fifths of 1 per centum of the gross receipts in excess of $2,000 derived

from such business for the calendar year 1936: *Provided, however,* That the tax imposed by this section shall be payable only upon the gross commissions of any person engaged in the business of a broker or agent, and shall not be payable upon the funds of his principal, of which he is a mere conduit."

On May 31, 1938, the petitioner filed its amended return of gross receipts, showing "Estimated gross receipts from sales made on orders solicited by traveling salesmen in the District of Columbia" in the amount of $480,721. Thereupon the Assessor assessed a tax equal to two-fifths of one per centum of such gross receipts, less an exemption of $2,000, or a tax of $1,913.08, and duly notified the petitioner. On June 10, 1938, the petitioner paid the tax, together with a penalty of $95.66, or a total of $2,008.74, under protest in writing (Rec. p. 18). On August 17, 1938, petitioner filed a petition with the Board of Tax Appeals seeking refund of the total amount paid (Rec. pp. 2, 3 and 4). Respondent filed an answer to the petition praying that the petitioner be required to report its entire receipts from sales in the District of Columbia during the calendar year 1936, including receipts from "non-solicited" orders, and that the tax be measured upon that portion of such receipts derived from a commercial activity in the District. Petitioner's total receipts from sales to persons in the District of Columbia during 1936 were $601,776 (Rec. p. 17).

The Board of Tax Appeals found the fair and adequate basis of apportionment of gross receipts of the petitioner to be as follows: "(a) with respect to non-solicited orders covering merchandise delivered in the delivery equipment of the petitioner or C. O. D., there should be allocated to the District of Columbia so much of the selling price as represents the cost of delivery; (b) with respect to solicited orders covering merchandise delivered by common carrier, there should be allocated to the District so much of the selling price as represents the cost of selling the merchandise, plus one-half of the difference between the gross receipts and the cost of selling the merchandise, and (c) with respect to solicited orders covering merchandise delivered in the delivery equipment of the petitioner or C. O. D., there should be allocated to the District the cost of selling and delivering the merchandise, plus one-half of the difference between the gross receipts and the cost of selling and delivering the merchandise. No other receipts should be taxed" (Rec. p. 19). The Board also found that the gross receipts of petitioner should be apportioned in accordance with the formula prescribed. The parties agreed upon a "Computation of Tax," in accordance with such formula, showing taxable gross receipts of $261,197.56 as derived from commercial activity in the District of Columbia and a tax due in the amount of $1,036.79, plus penalty of $51.84 (Rec. p. 16). Pursuant to such computation, the Board determined that a business privilege tax and penalty in the sum of $920.11 had been erroneously collected from the petitioner by the District of Columbia and ordered a refund in that amount.

ARGUMENT

I

Gross receipts for the calendar year 1936 are used merely as a measure of the tax.

Petitioner argues that the tax is not merely measured upon its gross receipts but that it is a direct tax upon such receipts. It is, however, clear that the business privilege tax imposed by Title VI, *supra,* is not a direct tax on gross receipts but an excise for the privilege of engaging in business in the District of Columbia. See: *Maine* v. *Grand Trunk R. Co.,* 142 U.S. 217; *Bass, Ratcliffe & Gretton, Ltd.* v. *Tax Comm.,* 266 U.S. 271, 280; *New York* v. *Jersawit,* 263 U.S. 493, 496.

The Act requires the taxpayer and the taxing authorities to look back to the year 1936 for a measuring stick, so to speak, to determine the tax for the privilege of doing business for the fiscal year 1937-1938. That the tax is not imposed upon gross receipts will be seen by supposing that petitioner, although it had been engaged in business in the District of Columbia during the year 1936, had discontinued all commercial activity in the District before the effective date of the

Act. In such case no tax could be imposed on its gross receipts for the year 1936, under Title VI. *Educational Films Corp.* v. *Ward,* 282 U.S. 379.

II

The District of Columbia is not a State within the meaning of the Commerce Clause of the Constitution.

An Act of Congress, to be valid under the Commerce Clause, must be a regulation of commerce with foreign nations, or among the several States, or with the Indian Tribes. "If not so limited, it is in excess of the power of Congress." *Trade-Mark Cases,* 100 U.S. 96.

In the case of *Hooe* v. *Jamieson,* 166 U.S. 395, the court said:

> "We see no reason for arriving at any other conclusion than that announced by Chief Justice Marshall in Hepburn v. Ellzey, 6 U.S. 2 Cranch, 445, February term, 1805; 'that the members of the American confederacy only are the states contemplated in the Constitution'; that the District of Columbia is not a state within the meaning of that instrument; and that the courts of the United States have no jurisdiction of cases between citizens of the District of Columbia and citizens of a state."

Mr. Justice Miller, in his dissenting opinion in the case of *Stoutenburgh* v. *Hennick,* 129 U.S. 141, the majority opinion not expressly deciding this point, said:

> "Unless the act for which Hennick was prosecuted in this case was commerce with a foreign nation, among the several States, or with an Indian Tribe, it is not an act over which the Congress of the United States had any exclusive power of regulation. * * *
>
> "Commerce between a citizen of Baltimore, which Hennick is alleged to be in the prosecution in this case, and citizens of Washington, or of the District of Columbia, is not commerce 'among the several States,' and is not commerce between citizens of different States, in any sense. Commerce by a citizen of one State, in order to come within the constitutional provision, must be commerce with a citizen of another *State*; and where one of

> the parties is a citizen of a Territory, or of the District of Columbia, or of any other place out of a State of the Union, it is not commerce among the citizens of the several States."

The power of Congress to regulate commerce in the District of Columbia is not derived from the Commerce Clause but from Clause 17, Section 8 of Article I, which gives the Congress the power "to exercise exclusive Legislation in all Cases whatsoever, over such District, (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."

El Paso & N. E. Ry. v. *Gutierrez,* 215 U.S. 87;
Hyde v. *Southern R. Co.,* 31 App. D.C. 466;
Jefferson v. *District of Columbia,* 40 App. D.C. 381;
Atlantic Cleaners and Dyers v. *United States,* 286 U.S. 427, 434.

In the case of *Inter-Island Co.* v. *Hawaii,* 305 U.S. 306, the petitioners contended that a tax on public utilities imposed by the Territorial Legislature of Hawaii, and approved by Congress, constituted a burden on interstate and foreign commerce in violation of the Commerce Clause of the Federal Constitution. With respect to such contention, the Court said:

> "Under the Constitution, Congress has the power to regulate interstate commerce. Therefore, assuming—but not deciding—that petitioner is engaged in interstate and foreign commerce, Congress has exercised its power in the present case by permitting the Territory to act upon this commerce by the imposition of the contested taxes. The imposition of these taxes under an Act to which Congress expressly subjected petitioner does not violate the Commerce Clause.
>
> "Congress had the power to subject petitioner to this tax by virtue of its authority over the Territory, in addition to its power under the Commerce Clause. 'Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words,

it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments.' "

III

The tax, as apportioned by the Board of Tax Appeals, would be valid even if imposed by a State legislature.

Petitioner argues that the receipts upon which the tax was measured were derived from transactions in interstate commerce and that such receipts are therefore relieved of all taxation. The Supreme Court has consistently held otherwise. In *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250, 254, the Court stated that "It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business"; that "Even interstate business must pay its way."

Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to commerce carried on within the taxing jurisdiction. *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250. In the case of *Adams Mfg. Co.* v. *Storen,* 304 U.S. 307, and *Gwinn, White & Prince, Inc.* v. *Henneford,* 305 U.S. 434, the Supreme Court held that taxes measured upon gross receipts from interstate sales were invalid when not apportioned to the commerce carried on within the taxing State and clearly indicated that if such taxes are apportioned the constitutional objection is thereby removed. The *Adams* case was remanded for further proceedings not inconsistent with the opinion. In the case of *James* v. *Dravo Contracting Co.,* 302 U.S. 134, which involved a gross receipts tax levied by the State of West Virginia, where it appeared that work had been performed partly in that State and partly in Pennsylvania, it was held, under authority of *Hans Rees' Sons* v. *North Carolina,* 283 U.S. 123, that the tax could be apportioned between the two States. It therefore appears that any state may impose a tax upon the gross receipts derived from a commercial activity *within* the taxing state.

IV

The tax imposed upon petitioner is valid.

Although it would appear that Congress has authority to measure the tax upon the entire receipts from business carried on partly within and partly without the District of Columbia (*Inter-Island Co.* v. *Hawaii,* 305 U.S. 306), respondent makes no contention that the tax imposed by Title VI was intended to be measured upon receipts derived from a commercial activity without the District. The definition of "business" in Section 1 (d) of Title VI, *supra,* clearly indicates that the business privilege tax is to be measured by the gross receipts derived from any *commercial activity in* the District of Columbia. If receipts are derived from business transacted partly within and partly without the District, that portion of such receipts fairly apportioned to the activity carried on within the District of Columbia is subject to the business privilege tax.

Petitioner here is engaging in a commercial activity in the District. The Board of Tax Appeals has found as a fact that, of petitioner's total receipts of $601,776 from sales in the District of Columbia during the calendar year 1936, $261,197.50 of such receipts resulted from commercial activity in the District of Columbia. The tax due was determined upon only receipts allocated to the District under the formula of apportionment prescribed by the Board.

The net effect of the decisions relating to allocation methods is that any formula of apportionment will be sustained unless the taxpayer submits convincing evidence and proof that it operates inequitably when applied to his business. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U.S. 113; *Bass, Ratcliffe & Gretton, Ltd.* v. *Tax Comm.,* 266 U.S. 271; *The Gorham Mfg. Co.* v. *Travis,* 274 F. 975.

Petitioner has offered no evidence tending to show that the apportionment adopted by the Board of Tax Appeals operates unfairly, nor does petitioner make any such contention. Petitioner has agreed that the method of computation was in accordance with the formula of apportionment prescribed by the

Board and, at no time, has the petitioner made any objection to the formula of apportionment by which the tax here in question was determined by the Board of Tax Appeals.

Petitioner argues that the tax, as applied, operates unfavorably on persons of the adjoining states. This contention is without merit since, in all cases, the tax is measured upon gross receipts derived from commercial activity *in* the District of Columbia. It was determined as a fact that $261,197.50 of petitioner's gross receipts were derived from a commercial activity in the District, and the tax was measured upon such receipts. Nor does the provision in Section 6 of Title VI, allowing as a credit upon business privilege taxes due any tax on tangible personal property levied by the District of Columbia and paid by the taxpayer, discriminate against non-residents. The credit is allowed to all persons who have paid any tangible personal property taxes to the District. The fact that petitioner paid no such taxes is immaterial. The same is true of many persons conducting business wholly within the District. However, even if Title VI did discriminate against non-residents it would not, for that reason, be invalid. *District of Columbia* v. *Brooke*, 214 U.S. 138, 150; *Haavik* v. *Alaska Packers Ass'n.*, 263 U.S. 510, 514-515.

CONCLUSION

For the reasons stated above it is respectfully submitted that the decision of the Board of Tax Appeals was correct and should be affirmed.

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